82-369

Office - Supreme Court, U.S.
FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

On Writ of Certiorari to the Court of Appeals For the Fourteenth Supreme Judicial District of Texas

PETITION FOR WRIT OF CERTIORARI

BRADLEY A. JACKSON
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Petitioner
Gulf Offshore Company,
A Division of the Pool Company

Of Counsel:

CHARLES D. KENNEDY
ROYSTON, RAYZOR, VICKERY & WILLIAMS

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED FOR REVIEW

Whether the rule of law regarding instructions to the jury that any award of damages would not be subject to federal income taxation established in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980) is applicable and controlling in an action arising under the Outer Continental Shelf Lands Act?[1]

---

1. This is precisely the same question raised in Petitioner's first Petition for Writ of Certiorari, Cause No. 80-590, granted by this Court on December 8, 1980. The case was argued March 31, 1981, and decided July 1, 1981. *Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation*, 453 U.S. 473 (1981). This Court indicated the determinative inquiry to be: "does the incorporation of state law (by the Lands Act) preclude a court from finding that state law is 'inconsistent' with a federal common law rule generally applicable to federal damages actions?" 453 U.S. at 488. Declining to answer this question unless Louisiana law would *not* require that the tax instruction be given upon timely request, creating a clear conflict with federal law, this Court remanded the case to the Texas Court of Appeals to consider the law of Louisiana and, if necessary, the issue of conflict between federal and state law.

The question focused upon by this Court is now squarely presented as the Texas Court of Appeals held, on remand, that Louisiana law does not *require* the tax instruction, making it inconsistent with the federal rule articulated in *Liepelt*. The Court of Appeals further held that although the Lands Act's incorporation of state law does not *preclude* a court from finding that state law is inconsistent with federal law, the federal law rule of *Liepelt* is not "applicable federal law" in a Lands Act case, so that inconsistent state law, incorporated as federal law by the statute, nevertheless controls. The Supreme Court of Texas has again refused to hear the case, necessitating this second Petition for Writ of Certiorari on this obviously vital issue involving construction of a federal statute and application of federal law.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceeding in the court whose judgment is sought to be reviewed and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. Mobil Oil Corporation, Respondent
   Arthur Levy Boat Service, Inc.
   L. A. Levy, Inc.
   Offshore Crews, Inc.
   Unknown underwriters at interest with the Levy entities, which assumed Respondent's defense.
2. Steven Gaedecke, Plaintiff
3. Jamail, Kolius & Mithoff, counsel for Plaintiff.
4. Employers' National Insurance Company, Intervenor.
5. Gulf Offshore Company, A Division of the Pool Company, Petitioner.[2]

---

2. In accordance with the amendment of Rule 21.1(b) to refer to amended Rule 28.1, Petitioner takes this opportunity to advise that:

   1) Gulf Offshore Company, A Division of the Pool Company no longer exists as a separate entity, having been totally absorbed by Pool Company.
   2) The parent company of Pool Company is ENSERCH Corporation.
   3) The non-wholly owned subsidiaries of Pool Company are Pool Arabia, Ltd. and Pool Santana, Limited.
   4) Affiliates of Pool Company are the following members of the ENSERCH Corporation group, many of which themselves have subsidiaries: ENSERCH Finance N.V., Ebasco Services Incorporated, Enserch Domestic International Sales Corporation, Intairdril (Aust.) Ptv. Ltd., Irano-Intairdril S.S.K., Lone Star Gas Company of Texas, Inc., LSG Intragas, Inc., Lone Star Gathering Company, Solus Ocean Systems, Inc., Solus Ocean Systems La. Inc., Samson Ocean Systems, Inc., Associated Oiltools, Inc., Enserch Canadian Exploration, Inc., LS Energy, and Enserch Exploration, Inc.

6. Underwriters subscribing Policy No. J.F.X. 0007, issued to ENSERCH Corp. and Pool Offshore Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
LIST OF PARTIES	II
TABLE OF AUTHORITIES	IV
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
The Holding of the Texas Court of Appeals on Remand	8
Conflict with the United States Supreme Court	9
Conflict with the Fifth Circuit Court of Appeals	15
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDIX A (Opinions and Judgments Below)	A-1
APPENDIX B (Raising the Federal Question Presented)	B-1

TABLE OF AUTHORITIES

CASES	Page
Berry v. Sladco, Inc., 495 F.2d 523 (5th Cir. 1974)	15
Chevron Oil v. Huson, 404 U.S. 97 (1971)	12, 13, 14, 15
Continental Oil Company v. The London Steam-Ship Owners' Mutual Insurance Association, Ltd., 417 F.2d 1030 (5th Cir. 1969)	16
Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation, 453 U.S. 473 (1981)	2, 6, 10, 11
Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980)	6, 7, 8, 9, 10, 11, 13, 14, 15, 16
Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969)	11, 12, 14, 16

UNITED STATES STATUTES	
28 U.S.C. § 1257(3)	2
43 U.S.C. § 1331, *et seq.* (Supp. 1982)	*passim*
43 U.S.C. § 1333	2, 11

MISCELLANEOUS	
S. Rep. No. 411, 83d Cong., 1st Sess. 2 (1953)	12

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GULF OFFSHORE COMPANY,
A DIVISION OF THE POOL COMPANY,
Petitioner

v.

MOBIL OIL CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas entered in the above-entitled case on January 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas on remand from this Court is reported at 628 S.W.2d 171 and is

printed in Appendix A to this Petition, *infra*, p. A-1. The Supreme Court of Texas denied Application for Writ of Error with the notation "no reversible error" and notification of such is printed in Appendix A, *infra*, p. A-11. The judgment of the District Court of Harris County is printed in Appendix A, *infra*, p. A-13. The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas reviewed by this Court in *Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation*, 453 U.S. 473 (1981), is reported at 594 S.W.2d 496 and is printed in Appendix A, *infra*, p. A-19.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1982. A timely Motion for Rehearing was filed on February 12, 1982, and overruled on February 25, 1982. Application to the Supreme Court of Texas for Writ of Error, filed March 29, 1982, was refused without opinion with the notation "no reversible error" on May 5, 1982. Timely Motion for Rehearing, filed May 20, 1982, was overruled on June 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). [The opinion of the Court of Appeals deals in pertinent part with federally created rights under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1982).]

STATUTE INVOLVED

Section 1333 of Title 43 of the United States Code, as it appeared at all times pertinent to this litigation, had, in part, as its subject matter the jurisdiction over and laws and regulations governing the subsoil and seabed

of the Outer Continental Shelf and all artificial islands and fixed structures erected thereon.

Subsection (a) provided that:

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, that mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the Outer Continental Shelf.
>
> (3) The provisions of this section for adoption of State law as the law of the United States shall

never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

STATEMENT OF THE CASE

This is an oil company (Respondent Mobil)/drilling contractor (Petitioner Gulf Offshore) contractual indemnity case arising in the area governed by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* (Supp. 1982). Respondent's action for contractual indemnity against Petitioner was brought as a third party action in a suit by a personal injury plaintiff, Gaedecke, against Respondent, which action also arose in the area governed by the Lands Act.

On July 9, 1974, Petitioner and Respondent entered into Contract No. 1159, which concerned oil well completion operations to be performed by Petitioner on Respondent's platform wells situated in Grand Isle Block 95 offshore of the State of Louisiana on the Outer Continental Shelf.

In September of 1975, Hurricane Eloise crossed the Yucatan Peninsula in the Gulf of Mexico and regained strength, necessitating evacuation of offshore oil platforms in the Gulf, including the platform upon which Petitioner was performing its completion work for Respondent.

Personal injury plaintiff Gaedecke was injured on September 22, 1975, following his evacuation from the platform to a work boat.

Plaintiff Gaedecke sued Respondent and three additional companies associated with the work boat, L. A.

Levy, Inc., Arthur Levy Boat Service, Inc. and Offshore Crews, Inc. for personal injuries sustained as a result of the accident. Respondent filed a Third Party Complaint against Petitioner, alleging liability for indemnity on both tort and contract theories.

Prior to trial, Plaintiff Gaedecke settled with Respondent and the Levy defendants, which had assumed Respondent's defense. Plaintiff proceeded solely against Respondent which, in turn, sought *contractual* indemnity from Petitioner.

Trial was to a jury, which found that Respondent Mobil, by its negligence as offshore platform owner, proximately caused the injuries to Plaintiff. Damages of $900,000.00 were found. The jury also found that Plaintiff's injuries were incident to or resulted directly or indirectly from the work of Petitioner under its contract with Respondent. Judgment for $900,000.00 was rendered in favor of Plaintiff against Respondent, out of which the Intervenor was awarded recovery of the sum of $32,712.09, its workers' compensation lien. Judgment for contractual indemnity in the amount of $900,000.00 was rendered against Petitioner.

Petitioner raised the federal question regarding appropriate instruction to the jury on the issue of taxation of any damage award by requesting that an instruction be given to the jury on the issue. Instruction C was requested in a timely and appropriate fashion prior to finalization of the jury charge but was refused by the Trial Court. (Tr. 198-199, 200-204) and printed in Appendix B, *infra*, p. B-1. Denial of the requested instruction was set forth as a reason for granting a new trial in Petitioner's Amended Motion for New Trial (Tr. 281), but such

Motion was overruled. The point was preserved in the appeal to the Court of Civil Appeals as Point of Error 13. The Court of Civil Appeals affirmed the Trial Court on the point. The issue was carried forward as the Twelfth Point of Error in Petitioner's Application for Writ of Error to the Supreme Court of Texas, but the Application was denied.

This Court granted Gulf Offshore's Petition for Writ of Certiorari, affirmed the lower courts in regard to the issue of subject matter jurisdiction, but vacated the Court of Civil Appeals' holding with respect to the tax instruction issue and remanded the case for further consideration.

The point of error was rebriefed and argued before the Court of Appeals on remand. The decision of the Trial Court was again affirmed. The issue was carried back to the Supreme Court of Texas, which again denied Petitioner's Application for Writ of Error.

REASONS FOR GRANTING THE WRIT

The significance of the question presented for review by this Petition has been established by this Court's granting of Gulf Offshore's first Petition for Writ of Certiorari raising precisely the same issue for resolution. A Writ of Certiorari was granted in Cause No. 80-590 by this Court on December 8, 1980. The case was argued March 31, 1981, and decided July 1, 1981. *Gulf Offshore Company, A Division of the Pool Company v. Mobil Oil Corporation*, 453 U.S. 473 (1981).

The important question of federal law which has not been, but must be settled by this Court, "whether *Liepelt* displaces the state rule in an OCSLA case," 453 U.S. at 488, was deferred by this Court pending a decision by

the Texas Court of Appeals on remand as to whether Louisiana law would *not* require that a tax instruction be given upon timely request, creating a clear conflict with the federal common law rule generally applicable to federal damages actions articulated in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980).

This obviously vital issue involving construction of a federal statute, the Lands Act, and application of federal law is brought squarely before this Court by this second Petition, necessitated by the holding of the Texas Court of Appeals on remand, which is in clear conflict with decisions of both this Court and the United States Court of Appeals for the Fifth Circuit. A definitive resolution of this important question of federal law can no longer be avoided in view of the Texas Court of Appeals' holding on remand that Louisiana law does not *require* the tax instruction, which is obviously inconsistent with the federal rule established in *Liepelt*.[3] This Court indicated in *Gulf Offshore*, this case, that the central question with respect to resolution of the issue presented for review need be answered only if Louisiana law was found to be inconsistent with federal law. As indicated, such a finding has now been made and the more significant question, "whether *Liepelt* displaces the state rule in an OCSLA case," is ripe for decision.

In summary, the compelling reasons why a review on Writ of Certiorari should be granted in this case are:

---

3. A decision on the question presented for review can be avoided only if this Court reviews the Texas Court of Appeals' decision regarding Louisiana law on the tax instruction issue and reverses it. Petitioner believes that the decision below on this point is gravely in error and that this Court should seriously consider deciding the question in connection with this Petition or certifying it to the Louisiana Supreme Court for an authoritative decision.

1.) The issue presented for review concerns an extremely important question of construction of a federal statute and application of federal law.

2.) The decision of the Texas Court of Appeals on remand is in direct conflict with the express language of the statute and decisions of both the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit interpreting it.

THE HOLDING OF THE TEXAS COURT OF APPEALS ON REMAND

As indicated, this cause was returned before the Texas Court of Appeals on remand, that court being asked to determine:

1.) Whether Louisiana law requires an instruction to the jury that damage awards are not subject to federal income taxation and, if it does not,

2.) Whether the federal common law rule requiring such an instruction articulated in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980) displaces the state rule in an Outer Continental Shelf Lands Act case such as this one.

Addressing these questions, the Court of Appeals held that:

1.) Louisiana law makes the giving of an explanatory instruction concerning income taxation discretionary with the trial court and,

2.) Although the incorporation of state law does not *preclude* a court from finding that state law is in-

> consistent with a federal common law rule generally applicable to federal damages actions, the *Liepelt* federal common law rule is not "applicable federal law" in this case because the Lands Act borrowed the Louisiana state law remedy for personal injury, including the Louisiana discretionary rule on instructing the jury regarding taxation of an award, and this borrowed state law is the federal law applicable in this case.

The holding that borrowed state law, not existing federal law, is applicable federal law in this cause is in conflict with decisions of both this Court and the Fifth Circuit Court of Appeals because it represents an incorrect interpretation of the express language of the statute. Under the Lands Act, borrowed state law can apply *only if* it is not inconsistent with existing federal law. The view that state law becomes federal law so that the state law *qua* federal law ousts federal law is simply incorrect. The statutory language is clear that the existence of federal law on a point precludes resort to state law, whether it be inconsistent or not.

CONFLICT WITH THE UNITED STATES SUPREME COURT

On two occasions, at the time of the initial appeal and on remand from this Court, the Texas Court of Appeals has held that the Trial Court committed no error in denying Petitioner's requested jury Instruction C, designed to make the jury aware that any award of damages would not be subject to federal income taxation. This is in direct conflict with this Court's holding in *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490

(1980). In *Liepelt*, this Court held that it was reversible error for the Trial Court to refuse a requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." In this case, Petitioner requested a similar, brief and easily understood instruction, which was refused.[4]

In *Gulf Offshore*, this case, this Court indicated that, although there was some "doubt", it would seem that if Louisiana law on the tax instruction issue is "inconsistent" with federal law as expressed in *Liepelt*, *Liepelt* controls. As will be discussed, in view of the Court of Appeals' holding that Louisiana law is "inconsistent" with federal law, *Liepelt* does control and the decision of the Court of Appeals is in error. The "doubt" expressed by this Court dissolves when the plain language of the statute, supported by its legislative history, is accorded proper deference.

The Court of Appeals evidently conceded that *Liepelt* expressed a federal common law rule generally applicable to federal damages actions, but held that the "Louisiana law which makes discretionary the giving of a jury instruction that damage awards are not subject to income taxation" became surrogate federal law in this case due to the Lands Act's borrowing of adjacent state law so

---

4. Petitioner's requested Instruction C was as follows:
You are instructed that, as a matter of law, any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the Federal Income Tax Law. In determining damages sustained by plaintiff, if any, you are to follow the instructions already given you by this court in measuring those damages and in no event should you either add to or subtract from that award on account of such damages not being subject to federal income taxes (Tr. 199), and printed in Appendix B, *infra*, p. B-1.

that the *Liepelt* rule was not "applicable." This analytical approach is incorrect because the Lands Act mandates an initial inquiry as to whether federal law on the particular point at issue exists. Where an affirmative answer is indicated, resort to "borrowing" of state law is not authorized. Under the Lands Act, existing federal law is "applicable" in the first instance so that state law, whether or not inconsistent, is not utilized. Stated simply, if there is no "gap" in the federal law, it is not necessary to "borrow" state law.

The language of the statute clearly provides that federal law is applicable in the Lands Act area and that state law is adopted as surrogate federal law only to fill "gaps" in the federal law. 43 U.S.C.A. § 1333, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

The legislative history of the Lands Act establishes that it was the intention of Congress that adopted state law *supplement*, rather than displace, federal law. Thus, if, as in this case, federal law on a particular point exists, it is controlling and state law, whether or not "inconsistent," will not apply. In other words, there being no "gap" in the federal law on the question of the appropriateness of a cautionary jury instruction, there is no need to look to the law of the adjacent state.

The Report of the Committee on Interior and Insular Affairs with respect to Senate Bill 1901 reflects the congressional intent that existing federal law be applied in the first instance. The Senate bill is essentially what became the Lands Act and the Committee Report with respect to it is, therefore, pertinent. With respect to the purpose of the bill and the law made applicable to the outer Continental Shelf, the Report indicates as follows:

> To carry out the primary purposes of the measure, a body of law is extended to the outer shelf area, consisting of:
>
> (a) The constitution and the laws, and the civil and political jurisdiction, of the Federal Government;
>
> (b) The regulations, rules, and operating orders of the Secretary of the Interior; and
>
> (c) in the *absence* of such applicable Federal law or adequate Secretarial regulation, the civil and criminal laws of the State adjacent to the outer shelf area. Such State laws are adopted as Federal law for the area of the shelf that would be within the boundaries of the State if such boundaries were extended seaward to the outer margin of the outer shelf. (Emphasis supplied)

S. Rep. No. 411, 83d Cong., 1st Sess. 2 (1953).

Apparently, the "doubt" voiced by this Court stems from the decision in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), relied upon by the Court of Appeals to support its decision, in which it was held that Louisiana law rather than federal common law provided the federal statute of limitations for personal injury damages actions under the Lands Act.

Upon a careful analysis of the holding in *Huson*, however, it is clear that the opinion is inapposite with respect to applying existing general federal common law as opposed to inconsistent state law. In *Huson*, this Court simply rejected the Fifth Circuit Court of Appeals' attempt to apply the *admiralty* doctrine of laches to an outer Continental Shelf case in the face of the holding in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969) that admiralty law remedies were not made

applicable by the Lands Act. The holding in *Huson* resulted from clear congressional intent that admiralty doctrines should not apply under the Lands Act. 404 U.S. at 104. This Court recognized that the application of Louisiana's statute of limitations was "subject to the absence of 'inconsistent' and applicable federal law." 404 U.S. at 103. Had there been in existence a federal statutory limitations period or, alternatively, had a general federal common law of laches apart from the limited *admiralty* doctrine of laches existed, the inconsistent Louisiana state law would have yielded to the applicable federal law. In *Huson*, the initial inquiry was whether applicable federal law existed on the issue of limitations. The inapplicability of the admiralty laches doctrine and the absence of other pertinent federal law cleared the way for borrowed state law to apply on the point.

This case differs from *Huson* because Petitioner has not sought creation of federal common law to apply in the place of inconsistent state law. Rather, Petitioner has solicited recognition that federal law on the question of a cautionary jury instruction regarding taxation of damage awards already exists and, under the express language of the Lands Act, must be applied. In *Gulf Offshore*, this case, it was recognized that *Liepelt* articulated a federal common law rule generally applicable in federal law damages actions. Petitioner perceives no cogent reason why this rule would not be "applicable" in Lands Act cases.

The desire of this Court to more carefully explore the interaction between federal law and borrowed state law under the Lands Act and the holding of the Court of Appeals that "borrowed" state law is the "applicable"

federal law, as opposed to *Liepelt*, is understandable in view of this Court's discussion in *Huson* regarding the incorporation of a "body" of state law and the Court's discussion in *Rodrigue* and *Huson* of Congress' concern for the application of law familiar to workers from the adjacent states. Although both aspects of the passage of the Lands Act are of interest, they are not controlling with respect to the applicability of state law in the face of existing federal law on the point in question because the express statutory language mandates use of existing federal law. It cannot be disputed that State law is to be borrowed only if existing federal law fails to address the issue in question.

In *Rodrigue*, this Court discussed the compromise in Congress which resulted in the present structure of the Lands Act and mentioned the "special relationship" between shelf workers and the adjacent shore which had an impact upon the final wording of the Act. Nevertheless, the Court made it clear that the Lands Act calls for application of existing federal law while supplementing gaps in that law with state law through the adoption of state law as the law of the United States. Prefacing a review of a portion of the congressional debate with respect to this aspect of passage of the Lands Act, the Court observed that:

> The principles that federal law should prevail, and that state law should be applied only as federal law and then only when no inconsistent federal law applied, were adopted by a Congress in which full debate had underscored the issue. 395 U.S. at 358.

In *Rodrigue*, state law applied only because the existing federal law, the Death on the High Seas Act, was found

inapplicable as an admiralty remedy expressly rejected by Congress in passing the Lands Act. The initial inquiry was whether existing federal law addressed the problem and was applicable.

Although the opinion in *Huson* discusses the adoption of a "body" of state law as federal law, the Court made it clear that the application of state law is subject to the absence of inconsistent and applicable federal law. As indicated above, it was only the absence of a generally applicable federal rule regarding limitations that permitted application of the Louisiana limitations period in that case.

In summary, proper respect for the clear language and structure of the Lands Act provision regarding the law to be utilized requires application in this case of federal law as enunciated in *Liepelt*. The *Liepelt* rule is generally applicable federal law which suffers no disqualification insofar as applicability on the outer Continental Shelf is concerned.

CONFLICT WITH THE FIFTH CIRCUIT COURT OF APPEALS

The principle that existing federal law is controlling, prohibiting reference to borrowed state law, is best illustrated by examination of authorities relating to other points of federal law. For example, in *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th Cir. 1974), the issue was whether interest should accrue from the time of judicial demand, as provided under Louisiana law, as opposed to from the time of judgment, as provided by federal law. The Fifth Circuit Court of Appeals held that where federal law exists on a point, such as the proper interest

period (or the giving of a cautionary jury instruction), such is controlling in an action brought under the Lands Act. The court specifically referred to this Court's decision in *Rodrigue* for this holding.

Also illustrative is the decision in *Continental Oil Company v. The London Steam-Ship Owners' Mutual Insurance Association, Ltd.*, 417 F.2d 1030 (5th Cir. 1969). In *Continental Oil*, the Fifth Circuit considered interaction between the Lands Act, maritime law and the Louisiana direct action statute. In the context of an ocean-going vessel having come into collision with a fixed off-shore drilling platform, the Fifth Circuit held that maritime law supplied a fully effective right and remedy and was applicable and controlling in opposition to the Louisiana direct action statute, which was part of the "borrowed" state law of the adjacent state under the Lands Act. The court discussed the "recurring theme of *Rodrigue*", that the question of the existence of federal law in the precise situation must be answered in the negative before the law of the adjacent state can be "borrowed."

From the language of the statute itself, from the legislative history of the Lands Act, and from the court opinions interpreting the Lands Act, it must be recognized that the law applicable to cases arising in the area governed by the Act is *federal* law, that existing federal law is to be applied in the first instance, and, finally, that state law *qua* federal law is utilized only when there is a gap in the existing federal law. On the basis of this analysis, it is clear that because federal law with respect to cautionary jury instructions regarding taxation of damage awards exists, in the form of *Liepelt*, inconsistent state law is not applicable or controlling. In fact, because

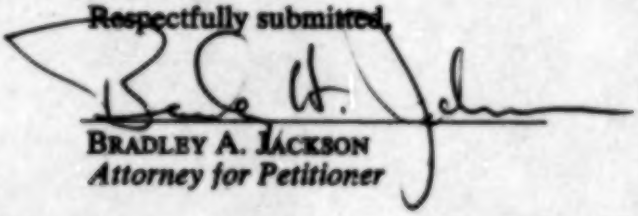
federal law on the point already exists, the statute prohibits the utilization of state law.

Because applicable and controlling federal law requires that the jury be instructed that any damage award will not be subject to income taxation and because the Trial Court refused to so instruct the jury upon timely request by Petitioner, this Petition should be granted and this case reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,



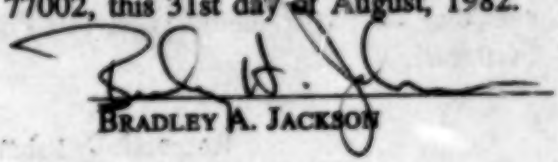
BRADLEY A. JACKSON
Attorney for Petitioner

Of Counsel:

CHARLES D. KENNEDY
ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondent by placing same in an envelope and depositing it in the United States Mail, with first-class postage prepaid, addressed to counsel of record as follows: Frank Caton, Esq., Crain, Caton, James & Womble, 3300 Two Houston Center, Houston, Texas 77010, and on the Plaintiff in the Trial Court by placing same in an envelope and depositing it in the United States Mail, with first-class postage prepaid, addressed to counsel of record as follows: Joseph D. Jamail, Esq., Jamail, Kolius & Mithoff, 3300 One Allen Center, Houston, Texas 77002, this 31st day of August, 1982.



BRADLEY A. JACKSON